

1 THE HONORABLE RICHARD A. JONES
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67 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SWINOMISH INDIAN TRIBAL COMMUNITY,

11 Plaintiff,

12 No.: C07-1348

13 vs.

14 PLAINTIFF'S REPORT ON EXPENDITURE
15 OF CONSENT DECREE SETTLEMENT
16 FUNDS17 SKAGIT COUNTY DIKE DISTRICT NO. 22,
18 BOARD OF COMMISSIONERS OF SKAGIT
19 COUNTY DIKE DISTRICT NO. 22, STANLEY
20 E. NELSON, NOLAN LEE, CURTIS B. WYLIE,
21 ROBERT A. HUGHES, AND DAVID HUGHES,

22 Defendants.

23
24 WHEREAS Plaintiff Swinomish Indian Tribal Community (“Tribe”) brought this action
25 against Defendants Skagit County Dike District No. 22, Board of Commissioners of Skagit
County Dike District No. 22, Stanley E. Nelson, Nolan Lee, whose seat on the Commission is
now filled by Greg Lee, Curtis B. Wylie, whose seat on the Commission is now filled by John
Wolden, Robert A. Hughes, and David Hughes (collectively, “District”) in October 2007,
alleging violations of the federal Endangered Species Act (“ESA”) and Clean Water Act
 (“CWA”) related to certain of the Defendants’ actions in replacing and maintaining tidegates and
other drainage infrastructure within its jurisdiction;

1 WHEREAS the Tribe moved for partial summary judgment on its CWA claims related to
2 the replacement of the Dry Slough, Wylie, and Eakins tidegates, and ESA claims related to the
3 replacement of the Dry Slough tidegate, and the Defendants moved for partial summary
4 judgment on the Tribe's claims related to the Wylie and Eakins tidegates;

5 WHEREAS this Court granted summary judgment to the Tribe in full on its motion
6 for partial summary judgment and denied the Defendants' motion for partial summary
7 judgment;

8 WHEREAS the Tribe requested that the Court defer granting a remedy to the Tribe
9 for the adjudicated violations of the ESA and CWA pending an opportunity to negotiate a
10 settlement regarding remedy;

12 WHEREAS the parties negotiated in good faith in an attempt to resolve the remedy issues
13 for the violations of law identified by the Court in its September 5, 2008 Order, and moved this
14 Court to adopt a Consent Decree obligating the parties to undertake certain actions within
15 specific deadlines;

16 WHEREAS after the parties negotiated minor modifications to the Consent Decree and
17 this Court approved such modifications, this Court entered an order approving the Amended
18 Consent Decree on January 29, 2009;

20 WHEREAS the Amended Consent Decree set forth a deadline of 18 months for issuance
21 of permits for construction of a Goose Reserve Restoration Project, and despite this deadline, no
22 permits were issued in the three and a half years following execution of the Amended Consent
23 Decree;

1 WHEREAS the Amended Consent Decree articulated an alternative remedy if permits for
 2 construction of the Goose Reserve Restoration Project were not issued within the 18-month
 3 deadline, namely the installation of a self-regulating tidegate at Dry Slough;

4 WHEREAS the parties have agreed that installation of a self-regulating tidegate at Dry
 5 Slough is no longer a suitable remedy for the District's violations of the CWA and ESA;

6 WHEREAS the parties negotiated in good faith to amend the obligations undertaken
 7 in the Amended Consent Decree and identified alternative obligations that resolve the legal
 8 issues identified by this Court, and submitted to the Court a [Proposed] Second Amended
 9 Consent Decree;

10 WHEREAS the Court entered an order approving the Second Amended Consent Decree
 11 on October 15, 2012;

12 WHEREAS the Second Amended Consent Decree required the Defendants to pay to the
 13 Plaintiff the sum of \$500,000 for the express and sole purpose of implementing actions that
 14 promote the recovery goals established in the federally-adopted Endangered Species Act
 15 Recovery Plan for Puget Sound Chinook salmon;

16 WHEREAS the Second Amended Consent Decree also required the Plaintiff to submit an
 17 annual report on the use of these funds to the Court, the United States Department of Justice, and
 18 Defendants describing the activities for which funds were used in support of the goals of the
 19 Recovery Plan, and the amounts expended for each activity, until such time as the Consent
 20 Decree funds are fully expended;

21 NOW, THEREFORE, Plaintiff SWINOMISH INDIAN TRIBAL COMMUNITY submits
 22 the following report:

1 To date, the Tribe has received four payments of \$125,000 each from the Defendants, for
 2 a total of \$500,000. Funding may support projects that “promote the recovery goals established
 3 in the federally-adopted Endangered Species Act Recovery Plan for Puget Sound Chinook
 4 salmon.” Second Amended Consent Decree at 4. Since its previous Report, the Tribe completed
 5 work on two projects previously funded with Consent Decree funds and made substantial
 6 progress on a new project that was supported by Consent Decree funds. All projects have
 7 advanced the Recovery Plan’s goals:

8 ***Swinomish Channel Feasibility Project.*** This project was completed during the current
 9 reporting period. As previously reported, in 2020 the Swinomish Tribe contracted with
 10 restoration scientists from the Skagit River System Cooperative to conduct a feasibility
 11 assessment of potential habitat restoration projects along the length of the Swinomish Channel,
 12 including on the Swinomish Reservation, for the benefit of Chinook salmon recovery. The
 13 Swinomish Channel is a migratory corridor for salmon connecting the natal Skagit River to the
 14 extensive eelgrass meadows of Padilla Bay, and habitat along its length has been degraded by a
 15 long history of marsh filling from navigation channel activities. Restoration of multiple sites is
 16 necessary to improve connectivity for fish moving along the channel from the Skagit River Delta
 17 to large rearing sites at the northern end, including Smokehouse and Telegraph Slough. The total
 18 cost for the Swinomish Channel Feasibility Project is \$171,500. The Tribe committed to
 19 expending \$51,450 in Consent Decree funds on the Project, primarily as match to leverage
 20 additional outside grant funding. In the prior reporting period, the Tribe spent \$6,157.33 of the
 21 committed Consent Decree funds.

22 During the current reporting period, the Tribe completed the Swinomish Channel
 23 Feasibility Project and spent the remaining amount of \$45,292.67 in Consent Decree funds. This
 24 project has advanced the Tribe’s ability to identify suitable Chinook salmon habitat restoration
 25

1 project sites along the Swinomish Channel, and the Tribe expects to proceed with further site
 2 feasibility assessment and preliminary design work as a result of this project.

3 ***Juvenile Chinook Salmon Response to Estuarial Restoration Study.*** This project was
 4 also completed during the current reporting period. As previously reported, the Juvenile Chinook
 5 Response Study was an ongoing and comprehensive study and review of the Tribe's Skagit delta
 6 fisheries data. The purpose of the Juvenile Chinook Response Study was to analyze existing
 7 juvenile Chinook and habitat data collected from seven estuary restoration projects conducted
 8 from 2001 to 2017 and synthesize this information into a comprehensive fisheries journal
 9 manuscript. The Tribe reported expenditures of Consent Decree funds in support of this project
 10 during the 2019 reporting period (\$16,591.05) and the 2020 reporting period (\$13,374.30).
 11 During the 2021 and 2022 reporting periods, there were no direct expenditures of Consent
 12 Decree funds for the Study. Nevertheless, the research scientists' work on the Study—supported
 13 by other grant funding sources—continued, and the project was completed. The Tribe has
 14 submitted one manuscript of this work for peer review in the Canadian Journal of Fisheries and
 15 Aquatic Sciences, titled "Landscape determinants of aquatic estuarine habitat use by juvenile
 16 Chinook salmon". The fisheries manuscript will inform the Tribe's future juvenile Chinook
 17 salmon monitoring and restoration work throughout the Skagit River estuary.
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19 ***McGlinn jetty emergency response-SRSC Technical Support:*** In April 2023 it was
 20 discovered that juvenile salmon, including ESA-listed Chinook, were being harmed as a result of
 21 stranding and entrainment on the McGlinn Island jetty. The Swinomish Tribe worked with the
 22 U.S. Army Corps of Engineers to implement an emergency repair that consisted of placing a
 23 graded mix of sand and gravel along approximately 200 feet of the jetty with the goal of
 24 reducing velocities through the porous structure to reduce the risk of fish entrainment. Skagit
 25 River System Cooperative ("SRSC") provided technical support for this effort, including

1 monitoring plan development and implementation, construction planning and coordination,
 2 development of adaptive management targets to limit fish entrainment, fish exclusion and
 3 effectiveness evaluation, and regular velocity measurements. The Tribe completed the majority
 4 of the above-described tasks within this reporting period, and expects to finish this project within
 5 the next reporting period. To date, the Tribe has expended \$94,104.78 in Consent Decree funds
 6 on the SRSC project to guide habitat restoration for Chinook salmon at the McGlinn Jetty.

7 The funds expended on and committed to the three projects described above advanced the
 8 goals of the Recovery Plan for Puget Sound Chinook salmon. Consistent with the requirements
 9 of the Second Amended Consent Decree, the projects support the Plan's recommendations to
 10 "protect, restore, evaluate, and monitor habitat condition for Skagit Chinook salmon." Second
 11 Amended Consent Decree at 4. The Court further provided examples of suitable projects for
 12 which settlement funding may be used, including "evaluating fish passage blockages and
 13 implementing restoration actions", "evaluating sources of instream pollution and implementing
 14 plans to reduce it", and "planning and implementing research projects on estuary survival and
 15 limiting factors." *Id.* The expenditures reported here are consistent with these examples and the
 16 Recovery Plan.

18 Respectfully submitted this 17th day of October, 2023.

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6 **CERTIFICATE OF SERVICE**

7 I hereby certify that on October 17, 2023, I electronically filed the foregoing *Plaintiff's*
8 *Report on Expenditure of Consent Decree Settlement Funds* with the Clerk of the Court using the
9 CM/ECF system, which will send notification of this filing to the attorneys of record and all
10 registered participants.

11 s/ Weston LeMay
12 Weston R. LeMay